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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. EMILIO SOLORZANO ROCHA, Defendant and Appellant.	H041621 (Santa Clara County Super. Ct. No. C1477177)

I. INTRODUCTION

Defendant Emilio Solorzano Rocha pleaded no contest to possession of matter depicting a person under age 18 engaging in or simulating sexual conduct (Pen. Code, § 311.11, subd. (a))[1] after a search of defendant's home revealed that he possessed child pornography on his computer and a thumb drive. Defendant was placed on probation for three years.

Defendant's conditions of probation included a condition requiring that he "enter in, participate in, and complete an approved sex offender management program" (§ 1203.067, subd. (b)(2)); a condition requiring that he "waive any privilege against self-incrimination and participate in polygraph examinations" as part of the sex offender management program (*id.*, subd. (b)(3)); and a condition requiring that he "waive any

[1] All further statutory references are to the Penal Code unless otherwise indicated.

psychotherapist/patient therapist privilege to enable communication between the sex offender management professional and probation officer" (*id.*, subd. (b)(4)).

Defendant's conditions of probation also included a condition requiring he "not knowingly date or form a romantic relationship with any person who has physical custody of a minor unless approved by the probation officer" (the dating condition); a condition requiring defendant "not knowingly access the internet or any other online service in use of a computer or other electronic device, at any location, including your place of employment, other than your home, without prior approval of the probation officer" (the internet access condition); a condition providing that his "computer and all other electronic devices, includ[ing] but not limited to cellular phones, laptop computers, or notepads shall be subject to forensic analysis search" (the electronics search condition); and conditions requiring he not "purchase or possess any material you know or reasonably should know to be pornographic or sexually explicit" and "not knowingly visit, be employed by, or remain in or engage in any business where pornographic materials are openly exhibited" (the pornography conditions).

On appeal, defendant challenges the probation conditions identified above. As we shall explain, we will affirm the order of probation.

II. DISCUSSION

A. Probation Conditions Mandated by Section 1203.067

In the trial court, defendant objected to the probation conditions imposed pursuant to section 1203.067, subdivisions (b)(3) and (b)(4), and he challenges the same conditions on appeal. Defendant argues that the probation condition requiring him to waive the privilege against self-incrimination and submit to polygraph tests (the section 1203.067, subdivision (b)(3) condition) must be modified because it is unconstitutionally overbroad and violates the Fifth Amendment. Defendant contends that the probation condition requiring him to waive the psychotherapist/patent privilege (the

section 1203.067, subdivision (b)(4) condition) must be stricken or modified because it is unconstitutionally overbroad and violates his right to privacy.

Our Supreme Court recently rejected similar challenges to the probation conditions required by section 1203.067, subdivisions (b)(3) and (b)(4). (*People v. Garcia* (2017) 2 Cal.5th 792 (*Garcia*).) In *Garcia*, the section 1203.067, subdivision (b)(3) probation condition required the defendant to " 'waive any privilege against self-incrimination and participate in polygraph examinations, which shall be part of the sex offender management program' " (*Garcia, supra,* at p. 799) and the section 1203.067, subdivision (b)(4) condition required the defendant to "waive any psychotherapist-patient privilege to enable communication between the sex offender management professional and the Probation Officer" (*Garcia, supra,* at p. 799).

As to the condition required by section 1203.067, subdivision (b)(3) (requiring probationers to waive "any privilege against self-incrimination" and participate in polygraph examinations), the California Supreme Court rejected the defendant's claim that the condition required him to waive his Fifth Amendment privilege. (*Garcia, supra,* 2 Cal.5th at pp. 802-803.) The court construed the condition as requiring probationers to "answer all questions posed by the containment team fully and truthfully, with the knowledge that these compelled responses could not be used against them in a subsequent criminal proceeding." (*Id.* at p. 803.) The court explained that, so construed, the condition did not violate the defendant's Fifth Amendment rights, since "the Fifth Amendment does not establish a privilege against the compelled disclosure of information; rather, it 'precludes the use of such evidence in a criminal prosecution against the person from whom it was compelled. [Citation.]" (*Id.* at p. 807.)

The California Supreme Court rejected the defendant's claim that the section 1203.067, subdivision (b)(3) condition was overbroad because the scope of the required polygraph examinations was "not limited to prior or potential sex offenses but would permit a polygraph examiner to ask 'anything at all, without limitation.' " (*Garcia,*

supra, 2 Cal.5th at p. 809.) The court explained that the condition was "expressly linked to the purposes and needs of the sex offender management program" and thus was "limited to that which is reasonably necessary to promote the goals of probation," i.e., "criminal conduct related to the sex offender management program." (*Ibid.*)

As to the condition required by section 1203.067, subdivision (b)(4) (requiring probationers to waive "any psychotherapist-patient privilege"), the California Supreme Court found that the condition did not violate the defendant's right to privacy and that the condition was not unconstitutionally overbroad. (*Garcia*, *supra*, 5 Cal.5th at p. 809.) The court first addressed the privacy issue, finding that the intrusion on the psychotherapist-patient privilege was "quite narrow," in that "a probationer's confidential communications may be shared only with the probation officer and the certified polygraph examiner." (*Id.* at p. 810.) The court noted that "[t]he waiver does not relieve the psychotherapist, probation officer, or polygraph examiner of their duty to otherwise maintain the confidentiality of this information." (*Ibid.*) With respect to the overbreadth issue, the court similarly noted that "[t]he required waiver [of the psychotherapist-patient privilege] extends only so far as is reasonably necessary to enable the probation officer and polygraph examiner to understand the challenges defendant presents and to measure the effectiveness of the treatment and monitoring program. [Citation.]" (*Id.* at pp. 811-812.)

As defendant acknowledges in a supplemental letter brief, *Garcia* resolves defendant's challenges to the probation conditions imposed pursuant to section 1203.067, subdivisions (b)(3) and (b)(4). In light of that California Supreme Court precedent, we decline to strike or modify those conditions. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

B. Dating Condition

Defendant challenges the probation condition that requires him to "not knowingly date or form a romantic relationship with any person who has physical custody of a minor

unless approved by the probation officer." He contends the condition is unconstitutionally overbroad.

Notably, in imposing the dating condition, the trial court specifically declined to impose the condition originally recommended by the probation department, which would have also prohibited defendant from socializing with any person who has physical custody of a minor unless approved by the probation officer. The trial court struck the word "socialize" from the condition. As imposed, we do not agree with defendant that this particular condition is overbroad.

A condition that restricted the defendant from dating or socializing with anyone with children was found overbroad in *United States v. Wolf Child* (9th Cir. 2012) 699 F.3d 1082, 1101 (*Wolf Child*), which defendant relies on. Since the condition in this case only restricts the persons whom defendant may date or form a romantic relationship with, that case is distinguishable.

In *Wolf Child*, one of the conditions of the defendant's supervised release was that he not " 'date or socialize with anybody who has children under the age of 18' without prior written approval from his probation officer." (*Wolf Child, supra*, 699 F.3d at p. 1100, fn. omitted.) In determining that the condition suffered from constitutional overbreadth because it infringed on Wolf Child's right to free association (*id.* at p. 1100), the Ninth Circuit Court of Appeals noted, "[t]he prohibited group includes people close to Wolf Child, such as family members, friends, and neighbors who might have children. It would also include a boss or coworker, a sponsor in a support group, or a spiritual leader. The number of people with whom Wolf Child might socialize, knowing them to have children under the age of 18, is indeed vast. For the 10 years of his supervised release, Wolf Child would be required to obtain prior written approval from his probation officer before, for instance, having dinner with [the mother of his oldest child] on a special occasion, or meeting a close family member or friend for coffee, or going to an AA meeting or a tribal function with others seeking to improve their own lives or their tribe's

social conditions generally; he might even find himself prohibited from joining his coworkers in the lunchroom or at a social activity sponsored by his employer." (*Id.* at p. 1101.) The *Wolf Child* court went on to say, "It is hard to imagine how Wolf Child would be able to develop friendships, maintain meaningful relationships with others, remain employed, or in any way lead a normal life during the 10 years of his supervised release were he to abide" by the condition that he not date or socialize with anybody who has children under the age of 18. (*Ibid.*) The *Wolf Child* court found the condition "overbroad and thus not sufficiently limited to achieving the goals of deterrence, protection of the public or rehabilitation." (*Id.* at p. 1100.)

The condition imposed here is designed to prevent defendant having contact with children. Unlike the condition imposed in *Wolf Child*, the condition here does not prohibit defendant from socializing with people such as family, friends and coworkers, whose children defendant may never come into contact with. Restricting the persons who defendant may date and form a romantic relationship with does not create a similar overbreadth problem. The number of individuals who defendant might seek to date or form a romantic relationship with is not nearly as large as the number of individuals defendant might socialize with. Further, although it is possible for a probationer to date or form a romantic relationship without coming into contact with the minors the condition seeks to protect, the condition is sufficiently restrictive in light of its purpose, which is to reduce defendant's opportunities for contact with minors. Thus, no modification of the dating condition is required.

C. Internet Access Condition

Defendant challenges the condition requiring that he "not knowingly access the internet or any other online service in use of a computer or other electronic device, at any location, including your place of employment, other than your home, without prior approval of the probation officer." Defendant asserts that the condition is unconstitutionally overbroad.

Defendant cites three federal opinions finding probation conditions prohibiting internet access to be overbroad. (See *United States v. Holm* (7th Cir. 2003) 326 F.3d 872, 878 [condition "overly broad if construed as a strict ban on Internet access"]; *United States v. Freeman* (3d Cir. 2003) 316 F.3d 386, 392, fn. omitted (*Freeman*) ["it is not reasonably necessary to restrict all of Freeman's access to the internet when a more limited restriction will do"]; *United States v. Sofsky* (2d Cir. 2002) 287 F.3d 122, 126 (*Sofsky*) ["Although the condition . . . is reasonably related to the purposes of his sentencing, . . . the condition inflicts a greater deprivation on Sofsky's liberty than is reasonably necessary"].)

However, as defendant acknowledges, this court rejected an overbreadth challenge to a condition restricting internet access in *People v. Pirali* (2013) 217 Cal.App.4th 1341 (*Pirali*). In *Pirali*, the condition provided: "You are not to *have access* to the Internet or any other on-line service through use of your computer or other electronic device at any location without prior approval of the probation officer." (*Id.* at p. 1345.) This court concluded that the condition at issue was not a "blanket prohibition" on Internet access because it "grants defendant the ability to access the Internet on his computer and other electronic devices so long as he obtains prior permission from his [probation] officer." (*Id*. at pp. 1349-1350.) Several federal opinions have also upheld such conditions. (See *United States v. Rearden* (9th Cir. 2003) 349 F.3d 608, 621 ["The condition does not plainly involve a greater deprivation of liberty than is reasonably necessary for the purpose because it is not absolute; rather, it allows for approval of appropriate online access by the Probation Office"]; *United States v. Ristine* (8th Cir. 2003) 335 F.3d 692, 695-696 [declining to follow *Freeman* and *Sofsky*]; *United States v. Zinn* (11th Cir. 2003) 321 F.3d 1084, 1093 [same].)

In this case, as in *Pirali*, the condition permits defendant to access the internet after having obtained permission from his probation officer. Moreover, the trial court modified the proposed condition to specifically permit internet use in defendant's home,

by inserting the phrase "other than your home." Thus, the internet access condition imposed here was not a "blanket prohibition" on Internet access (*Pirali, supra*, 217 Cal.App.4th at p. 1349) and it is not unconstitutionally overbroad.

D. Electronic Devices Condition

Defendant challenges the condition providing that his "computer and all other electronic devices, includ[ing] but not limited to cellular phones, laptop computers, or notepads shall be subject to forensic analysis search." Defendant contends the condition is overbroad because it violates his constitutional right to privacy. He argues the condition "forces him to surrender his privacy rights in regards to matters that are not reasonably related to deterring criminal behavior."

This court rejected an overbreadth argument in *People v. Ebertowski* (2014) 228 Cal.App.4th 1170 (*Ebertowski*), where the challenged probation condition required the defendant to " 'provide all passwords to any social media sites, including Facebook, Instagram and Mocospace and to submit those sites to search at any time without a warrant by any peace officer.' " (*Id.* at p. 1172.) The *Ebertwoski* defendant was a member of a criminal street gang who had promoted his gang on social media. This court rejected the defendant's claim that the probation condition was "not narrowly tailored to [its] purpose so as to limit [its] impact on his constitutional rights to privacy, speech, and association." (*Id.* at p. 1175.) This court explained that the state's interest in preventing the defendant from continuing to associate with gangs and participate in gang activities, which was served by the probation condition, outweighed the minimal invasion of his privacy. (*Ibid.*)

Defendant asserts that his overbreadth claim is supported by the reasoning of *Riley v. California* (2014) 573 U.S. __ [134 S.Ct. 2473] (*Riley*), in which the United States Supreme Court held that the warrantless search of a suspect's cell phone implicated and violated the suspect's Fourth Amendment rights. (*Id.*, 134 S.Ct. at p. 2493.) In so holding, the court explained that modern cell phones, which may have

the capacity to be used as mini-computers, can potentially contain sensitive information about a number of areas of a person's life. (*Id.* at pp. 2488-2489.) The court emphasized, however, that its holding was only that cell phone data is subject to Fourth Amendment protection, "not that the information on a cell phone is immune from search." (*Id.* at p. 2493.)

As *Riley* did not involve probation conditions, it is inapposite. Unlike the defendant in *Riley*, who at the time of the search had not been convicted of a crime and was still protected by the presumption of innocence, defendant is a probationer. "Inherent in the very nature of probation is that probationers 'do not enjoy "the absolute liberty to which every citizen is entitled." ' [Citations.] Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." (*United States v. Knights* (2001) 534 U.S. 112, 119.)

Defendant also discusses *United States v. Lifshitz* (2d Cir. 2004) 369 F.3d 173 (*Lifshitz*), in which the court considered a probation condition requiring the defendant to consent to the installation of a monitoring system on his computer. (*Id.* at p. 177 & fn. 3.) The appellate court found that the record contained "very little information . . . about what kind of monitoring the probation condition authorizes" and (*id.* at p. 190) and indicated the condition might be overbroad depending on whether the monitoring "focuses attention upon specific types of unauthorized materials," or on "all activities engaged in by the computer user" (*id.* at p. 191). Since the *Lifshitz* court could not determine whether the condition was overbroad, it remanded the case so the district court could "evaluate the privacy implications of the proposed computer monitoring techniques as well as their efficacy as compared with computer filtering." (*Id.* at p. 193.)

In this case, defendant was not required to consent to a computer monitoring system. Defendant does not suggest how the probation condition imposed here could be more narrowly tailored but still serve the state's interest in preventing defendant from

possessing child pornography on his electronic devices. Since defendant possessed child pornography on his computer and thumb drive, the probation condition requiring defendant's electronic devices be subject to forensic analysis search is closely tailored to the purposes of the condition in this case. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 890.) The government's interest in ensuring defendant complies with the terms of his probation outweighs the intrusion on defendant's privacy rights. We therefore conclude that the electronic devices condition is not overbroad.[2]

E. Pornography Conditions

Defendant challenges, as unconstitutionally vague, the probation conditions ordering him not to "purchase or possess any material you know or reasonably should know to be pornographic or sexually explicit" and "not knowingly visit, be employed by, or remain in or engage in any business where pornographic materials are openly exhibited."

Defendant's vagueness challenge concerns the phrase "any material he knows or should know to be pornographic or sexually explicit material." He asserts that this phrase "does not clearly state what material is at issue" and that "reasonable minds can differ about what material [he] knows or show not [know] is pornographic." He expresses the fear that "the determination of 'pornographic or sexually explicit material' may ultimately translate to whatever the probation officer finds improper."

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[2] The California Supreme Court has granted review in *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted February 17, 2016, S230923, which presents the question whether a probation condition requiring a minor to submit to warrantless searches of his "electronics including passwords" is overbroad. (*Id.* at p. 886.) Review has been granted in a number of other cases presenting similar issues, with briefing deferred. (See, e.g., *In re Patrick F.* (2015) 242 Cal.App.4th 104, review granted Feb. 17, 2016, S231428; *In re Alejandro R.* (2015) 243 Cal.App.4th 556, review granted Mar. 9, 2016, S232240; *In re J.E.* (2016) 1 Cal.App.5th 795, review granted Oct. 12, 2016, S236628; *People v. Nachbar* (2016) 3 Cal.App.5th 1122, review granted Dec. 14, 2016, S238210.)

Defendant notes that in *People v. Turner* (2007) 155 Cal.App.4th 1432 (*Turner*) and *Pirali, supra,* 217 Cal.App.4th 1341, similar probation conditions were modified due to vagueness problems. In *Turner,* the challenged condition required the defendant "[n]ot possess any sexually stimulating/oriented material deemed inappropriate by the probation officer and/or patronize any places where such material or entertainment is available." (*Turner, supra,* at p. 1435.) The court held that the condition did not provide the defendant with advance notice of what was prohibited and modified the condition to read: " 'Not possess any sexually stimulating/oriented material having been informed by the probation officer that such material is inappropriate and/or patronize any places where such material or entertainment in the style of said material are known to be available.' " (*Id.* at p. 1436.) In *Pirali,* the challenged condition provided, "You're ordered not to purchase or possess any pornographic or sexually explicit material as defined by the probation officer." (*Pirali, supra,* at p. 1344.) This court expressed concern that the probation officer could "deem material sexually explicit or pornographic *after* defendant already possesses the material," which "would produce a situation where defendant could violate his probation without adequate notice." (*Id.* at p. 1352.) Thus, following *Turner,* this court modified the condition to read: "You're ordered not to purchase or possess any pornographic or sexually explicit material, having been informed by the probation officer that such items are pornographic or sexually explicit." (*Pirali, supra,* at p. 1353.)

In this case, the condition does not include the language found to be problematic in *Turner* and *Pirali,* in that the condition does not reference the probation officer's subjective determination of what is pornographic or sexually explicit. In fact, the trial court here included a reference to defendant's own advance knowledge and constructive knowledge of what is pornographic and explicit. Thus, neither *Turner* nor *Pirali* helps defendant.

In arguing that the term "pornographic or sexually explicit" is unconstitutionally vague, defendant relies primarily on *United States v. Guagliardo* (9th Cir. 2002) 278 F.3d

868 (*Guargliardo*). In that case, the defendant's conditions of supervised release included a condition that he not possess " 'any pornography.' " (*Id.* at p. 872.) The Ninth Circuit agreed with the defendant that "a probationer cannot reasonably understand what is encompassed by a blanket prohibition on 'pornography,' " describing the term "pornography" as "entirely subjective." (*Ibid.*) The court rejected the government's contention that the definition could be set by the probation officer, explaining, "A probation officer could well interpret the term more strictly than intended by the court or understood by Guagliardo." (*Ibid.*) The court remanded the matter to the district court with directions "to impose a condition with greater specificity." (*Ibid.*)

The condition here does not impose "a blanket prohibition on 'pornography.' " (*Guagliardo, supra,* 278 F.3d at p. 872.) Rather, the condition here restricts defendant from possessing material he knows or reasonably should know to be pornographic or sexually explicit. By expressly tying the definition of "pornographic or sexually explicit" to defendant's own knowledge or constructive knowledge, the trial court adequately addressed defendant's concern that the terms were subject to definition by reference to the probation officer's subjective beliefs. (Cf. *People v. Mendez* (2013) 221 Cal.App.4th 1167, 1176 [constructive knowledge element is "similar to the familiar reasonable person standard"].)

Further, to the extent *Guagliardo* is relevant, it is not binding authority. (See *People v. Bradley* (1969) 1 Cal.3d 80, 86 [decisions of the "lower federal courts" are not binding on California courts].) We believe the terms "pornography" and "sexually explicit" are "sufficiently definite to inform the probationer what conduct is required or prohibited, and to enable the court to determine whether the probationer has violated the condition. [Citations.]" (*People v. Hall* (2017) 2 Cal.5th 494, 500.) According to one dictionary, the term "pornography" is defined as "the depiction of erotic behavior (as in pictures or writing) intended to cause sexual excitement" or "material (as books or a photograph) that depicts erotic behavior and is intended to cause sexual excitement."

(Webster's Tenth New Collegiate Dict. (1999) p. 907.) The phrase "sexually explicit" is similarly definite. (See *Turner*, *supra*, 155 Cal.App.4th at p. 1437 [condition barring knowing possession of "any sexually stimulating/oriented material" was not overbroad]; *People v. Moses* (2011) 199 Cal.App.4th 374, 377 [condition barring possession of "sexually explicit . . . devices" was "not so imprecise that defendant will be unable to determine whether he is in compliance with the terms of his probation"].) Thus, we conclude that the pornography conditions are not unconstitutionally vague.

III. DISPOSITION

The order of probation is affirmed.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.

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